IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 914 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Appellant(s)

Versus

M.V.CONSTRUCTION CO. - Opponent(s)

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Appearance :
MR MANISH R BHATT for Appellant(s) : 1,
None for Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 23/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The appellant revenue has proposed the following two questions:

> "[1] Whether the Appellate Tribunal is right in law and on facts in holding that the provisions of section 40A(3) of the Act would not be applicable in view of non-obstant clause of section 44AD and thereby deleting the disallowance of Rs.2,19,200/- made by the Assessing Officer?
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> [2] Whether the Appellate Tribunal ought not have appreciated that the provisions of section 40A(3) of the Act had over-riding effect with regard to certain expenses or payment not deductible in certain circumstances and, therefore, the disallowance made by the Assessing Officer was

justified?”

2.Mr.M.R.Bhatt, the learned senior standing counsel for the appellant has submitted that the Tribunal has erred in reading the provisions of Section 44AD of the Income Tax Act, 1961 (the Act). According to him, under sub-section (1) of Section 44AD, when the assessing authority is required to take into consideration the two prescribed parameters, namely, (1) the figure of 8% of gross receipts, and (2) the returned income, at the time when the second figure is taken, the assessing authority is entitled to process the return and then arrive at the said figure and for this purpose, all the provisions of the Act have to be taken into consideration. In support of the proposition, he has also placed reliance

on the opening portion of sub-section (1), which begins with a non-obstante clause, as well as sub-sections (2) and (3) of Section 44AD of the Act.

3. As can be seen on a plain reading of the provision, all that it requires is that, (1) an assessee must be engaged in the business of civil construction or supply of labour for civil construction, (2) in case of such an assessee, a sum equal to 8% of the gross receipts received or accrued to the assessee in the previous year, have to be compared with the sum declared by the assessee in his return of income, (3) then, the higher of the two figures has to be adopted for the purposes of assessing the assessee. The opening portion, namely, non-obstante clause, stipulates that, for the purposes of working out the figure of 8% of gross

receipts, the provisions contained in sections 28 to 43C of the Act have to be ignored. The said provision, namely, the non-obstante clause, does not have any further role to play. Similarly, insofar as the return of income is concerned, it is the figure declared by the assessee, and that is what is stated by the provision, has to be adopted. No processing at that stage is permissible. Therefore, the provisions of section 40A(3) of the Act cannot be pressed into service at this stage.

4. The stage at which sub-section (2) of Section 44AD of the Act can come into play is, after the higher of the two sums, namely, 8% of gross receipts or the sum declared in the return of income is arrived at. Sub-section (2) of Section 44AD of the Act envisages that once the

said figure has been worked out, no further deduction as allowable under Sections 30 to 38 of the Act, is allowable. It is necessary to bear in mind that section 40-A(3) of the Act does not operate as an independent provision. To recapitulate, Section 40A opens with the words “The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to computation of income under the head `Profits and gains of business or profession'”. Therefore, in case of any purchase price or any payment in cash, which is otherwise allowable under Section 37 of the Act or Section 28 of the Act, is proportionately disallowable if the conditions stipulated under Section 40A(3) of the Act stand satisfied. However, the

said exercise is not permissible once the figure of 8% of gross receipt is found to be higher than the sum declared in the return.

5. Sub-section (3) of Section 44AD of the Act, instead of coming to the aid of the interpretation canvassed by revenue, indicates a contrary legislative intent. Despite the non-obstante provisions stated in sub-sections (1) and (2) of Section 44AD of the, sub-section (3) of the said provision stipulates that depreciation is deemed to have been claimed and granted in such circumstances. This is to obviate that, in the subsequent years, if provisions of Section 44AD are not invoked, there would be no dispute as to the written down value in relation to depreciable assets.

6. Therefore, there is no infirmity in the

reading of the provision by the Tribunal so as to give rise to any substantial question of law. The appeal is accordingly dismissed.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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